

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM Docket No. 92-64
WIND 'N SEA FM LIMITED PARTNERSHIP)	File No. BPH-901224ME
WEBB BROADCASTING, INC.)	File No. BPH-901224MF
ARIS MARDIROSSIAN)	File No. BPH-901224MI
EQUAL TIME BROADCASTING CORP.)	File No. BPH-901224MK
J.H. COMMUNICATIONS)	File No. BPH-901226MB
For Construction Permit for a)	
New FM Station on Channel 295A)	
(106.9 MHz) in Ocean City, MD)	
To: The Honorable Edward Luton)	
<u>Administrative Law Judge</u>)	

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

OPPOSITION TO PETITION TO DISMISS

WIND 'N SEA FM LIMITED PARTNERSHIP ("Partnership"), pursuant to Section 1.294(c)(3) of the Commission's Rules,^{1/} hereby opposes the Petition to Dismiss Partnership's application filed on May 13, 1992 by JH Communications ("Communications").^{2/}

A. Summary

1. The Petition by Communications ignores Commission precedent and misapplies case law. Partnership was properly designated for hearing by the Chief of the Audio Services Division.

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^{1/} 47 C.F.R. §1.294(c).

^{2/} Partnership's Opposition is timely filed. 47 C.F.R. §1.294(c). Although counsel for Communications served the Petition by hand, the Commission's Rules provide for 10 days for the filing of an opposition to a petition to dismiss lodged by an adverse party. 47 C.F.R. §1.294(c)(3).

An Administrative Law Judge cannot modify matters specifically addressed by the Hearing Designation Order. See, Anax Broadcasting, Inc., 87 FCC 2d 483, 486 (1981). As required by the HDO, Partnership properly filed an amendment to address the short spacing issue. The Presiding Judge should deny the Communications Petition.

**B. Ambiguities in Section 73.213(c)
Preclude Dismissal of Partnership's Application.**

2. To support its contention that Partnership's application must be dismissed, Communications relies on a series of cases,^{3/} none of which dealt with the issue of short-spaced allotments like the Ocean City FM allocation.^{4/} Indeed, it was the very confusion created by the former version of Section 73.213(c)(1) of the Rules which has caused the Bureau to allow corrective amendments not only in this Ocean City proceeding, but also in various other proceedings, too. Frank K. Spain (Hearing Designation Order), 6 FCC Rcd 6143 (M. Med. Bur. 1991) (Temecula, California FM); Jeffery Scott (Hearing Designation Order), 7 FCC Rcd 8733, DA 92-559, released May 14, 1992 (Bethany Beach, Delaware).

^{3/} Michael J. Benns, 6 FCC Rcd 2182 (M. Med. Bur. 1991); Black Hills Christian Communications, Inc., 6 FCC Rcd 500 (M. Med. Bur. 1991); Dorsey Eugene Newman, 6 FCC Rcd 330 (M. Med. Bur. 1991); Shenandoah Broadcasting of Texas, Inc., 5 FCC Rcd 3055 (M. Med. Bur. 1990); Pueblo Radio Broadcasting Services, 5 FCC Rcd 6278 (1990).

^{4/} The Pueblo Radio Broadcast Services case, supra, does not even deal with the question of short-spaced applications, but rather a Mexican treaty violation.

3. The Commission amended Section 73.213 in May 1991. Prior to that time, when Partnership filed its application, Section 73.213(c)(1) read as follows:

"(c) ... New Stations on channel allotments made by order granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989 may be authorized in accordance with paragraph (c)(1) or (c)(2) of this section. No other stations will be authorized pursuant to these paragraphs.

"(1) Applications for authorization under requirements equivalent to those of prior rules. Each application for authority to operate a Class A station with no more than 3000 watts ERP and 100 Meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) must specify a transmitter site that meets the minimum distance separation requirements in this paragraph...

47 C.F.R. §73.213(c)(1) (1990) and subsequently superseded.

4. The implication of the rule was that an applicant need only meet the minimum distance separations set forth in the Table that accompanied Section 73.213(c) if the allotment were short-spaced. Contrary to the suggestion of Communications, an applicant did not have to request processing under Section 73.213(c) (as opposed to the explicit requirement that an applicant request processing under Section 73.215 if it sought contour protection).^{5/} As the Bureau recognized in the HDO, Partnership met the spacing

^{5/} Section 73.215 of the Commission's Rules states in pertinent part: "Each application to be processed pursuant to this section must specifically request such processing on its face, and must include the necessary exhibit to demonstrate that the requisite contour protection will be provided." 47 C.F.R. §73.215. By contrast, there is no such requirement under Section 73.213(c) of the Rules.

requirements set forth in Section 73.213(c)(1). HDO, supra, at ¶ 3.^{6/}

5. As Communications is also well aware, the petition for rulemaking in this proceeding was filed before October 2, 1989. Counsel for Communications filed the petition! See, Notice of Proposed Rulemaking, 4 FCC Rcd 8733 (M. Med. Bur. 1989). Further, the Commission acknowledged that the allotment was short-spaced when it made the allocation. Report and Order, 5 FCC Rcd 5804 (M. Med. Bur. 1990), at fn. 1. Hence, it was reasonable for Partnership to conclude that the application could be processed under Section 73.213(c)(1) as then written.

6. The confusion inherent in the Rules resulted in the amendment of Section 73.213(c) as follows:.

"If the reference coordinates of an allotment are short-spaced to an authorized facility or another allotment (as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section **only with respect to such short spacing.**"

Memorandum Opinion and Order in MM Docket 88-375, 6 FCC Rcd 3417, 3429-3425, ("MO&O") (emphasis supplied). In explanation of the change, the Commission noted that:

"[W]e wish to clarify our policy regarding applications for construction permits filed to implement allotments

^{6/} It should be noted that Communications made the same error of being short-spaced to WQMR-FM, which was not short-spaced to the Ocean City allotment, that Partnership made. HDO, supra, at ¶¶ 2 and 4. Therefore, it was required to amend its application because the Bureau held that 47 C.F.R. §73.213(c)(1) could not be applied to WQMR. Id., ¶¶ 4, 6.

resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new FM spacing requirements). Such applications must meet the new FM spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment."

Id., 6 FCC Rcd at 3418, fn. 7 (emphasis supplied). In the Commission's own words, it sought to "clarify" the confusion that existed with respect to the short-space provisions. However, the Commission did not release the MO&O until May 29, 1991, more than 4 months after Partnership filed its Ocean City application.

7. As noted in footnote 3 of this Opposition, Communications has cited a series of cases that it claims justify dismissal of Partnership's application. Not only do all of the cases relied upon by Communications not deal with short-spaced allotments, but also they all predate the MO&O, supra, in which the Commission clarified and modified its rules. As the Bureau acknowledged in the HDO, applicants cannot be held subject to dismissal where the rules are unreasonably ambiguous. HDO, supra, at ¶ 6, citing Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985). See also, Frank K. Spain, supra, 6 FCC Rcd at 6144-45 (¶ 9), also citing Salzer. Like the Allocation Order in the Temecula case, the Allocation Order in this case, too, failed to limit the permissible short-spacings. Compare, Frank K. Spain, 6 FCC Rcd at 6144 (¶ 9). Like other similarly situated applicants, which were allowed the opportunity to correct deficiencies, Partnership should not now be punished as a result of ambiguities in the Commission's Rules.

**C. An ALJ Has Limited Discretion
To Modify Issues Considered in the HDO.**

8. An Administrative Law Judge may not modify hearing issues on grounds already considered in the designation order. See, Revised Processing of Broadcast Applications, 72 FCC 2d 202, 216 (1979); Atlantic Broadcasting Co., 5 FCC 2d 717 (1966); Fidelity Radio Inc., 1 FCC 2d 661 (1965). In this case, the Bureau spent five paragraphs of the HDO considering the short-space impact of the applications. HDO, at ¶¶ 2-6. Moreover, the Bureau explicitly rejected the idea of dismissal of Partnership or any other applicant. HDO, at ¶ 6.

9. Communications mistakenly suggests that the HDO did not discuss the merits of whether Partnership's application should be dismissed. At paragraph 6 of the HDO, the Audio Services Division noted that

"...we find that return of the applications with no opportunity to correct the defect would be inappropriate, because the applicants did not, for "hard look" processing purposes, have full and explicit notice of the prerequisites they must meet to avoid summary dismissal."

On this basis, Partnership and Communications were permitted to file curative amendments. See, HDO, ¶¶ 6 and 18.^{7/}

10. In Frank H. Yemm, 39 RR 2d 1657 (1977), the Commission ruled that the ALJ had exceeded his authority when dismissing an application on essentially the same grounds as those considered by the Broadcast Bureau in its designation order. There the

^{7/} The Bureau has supported the grant of Partnership's curative amendment. See, "Mass Media Bureau's Comments In Support OF Petition For Leave To Amend And Amendment," filed May 21, 1992.

Commission found that "...although an ALJ may under appropriate circumstances dismiss an application, such as in instances involving failure to prosecute, the ALJ here has exceeded his authority". See also, Anax, supra, 87 FCC 2d at 486, quoting Yemm, supra.

11. Finally, in Atlantic Broadcasting, supra, the Commission concluded that the Review Board's construction of Fidelity Radio is generally correct to the extent that the Board concluded that it lacks authority to modify the issues with respect to matters about which the Commission was cognizant when the designation order was released". Id., 5 FCC 2d at 719.

12. The same considerations apply here. The Presiding Judge cannot modify the Bureau's resolution of the short-spacing because the Bureau has already considered the matter at length.

D. Conclusion

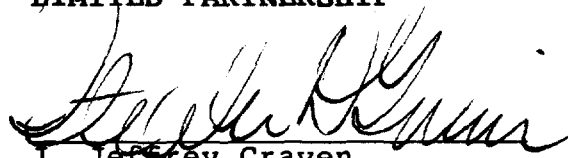
13. There is no basis for dismissal of Partnership's application. Indeed, the Presiding Judge cannot alter a matter already considered at length by the Bureau in the HDO. The facts and case law of this matter are so resolutely clear and so demonstrably in Partnership's favor, that one must question the basis for Communications' Petition.

WHEREFORE, in view of the foregoing, Partnership respectfully requests that the Presiding Judge reject Communications' Petition to Dismiss Partnership's application.

Respectfully submitted,

WIND 'N SEA FM
LIMITED PARTNERSHIP

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Dated: May 26, 1992
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Certificate of Service

I, Carla L. Duryea, a secretary in the law firm of Besozzi & Gavin, do hereby certify that copies of the forgoing "OPPOSITION TO PETITION TO DISMISS" were, on this 26th day of May, 1992, sent by first-class U.S. mail, postage prepaid, to the following individuals (except as otherwise noted):

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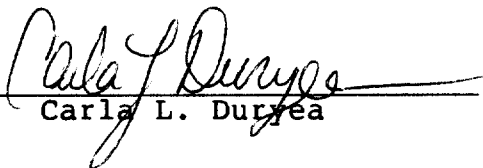
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